10381

Supreme Court of the United States.

OCTOBER TERM, 1902.

No. 404.

THE GERMAN SAVINGS AND LOAN SOCIETY,
PLAINTIFF IN ERROR,

vs.

DORA MAY DORMITZER, WILLIAM L. TULL, AND ERNEST B. TULL.

IN ERROR TO THE SUPREME COURT OF THE STATE OF WASHINGTON.

MOTION TO DISMISS OR AFFIRM.

MOTION.

And now come the defendants in error and move the court to dismiss the writ of error herein or to affirm the judgment and decree, and assign the following reasons:

1. No Federal question is necessarily involved in the judgment of the court below.

2. The question on which jurisdiction is claimed is so frivolous as not to need further argument.

3. If there is a Federal question involved in the judgment, the decision of the court is so clearly right that the writ of error should be dismissed or the decree and judgment affirmed.

4. That questions not Federal, other than the Federal question stated, were decided in said cause adversely to the plaintiffs in error, and were sufficient, notwithstanding the Federal question, to sustain the judgment and decree.

5. That the matter decided was that the ownership of the unincumbered, undivided one-half of the property in controversy was in the defendants in error, independently of the question of full faith and credit given to the judgment and decree of divorce in the Kansas court.

ROBERT A. HOWARD,
Attorney for Defendants in Error.

THE PLEADINGS.

The pleadings in this case are voluminous. They are fully set out, as also are the facts found, in the opinion of the court, found in the Transcript, pp. 305–361. While respectfully requesting the attention of the court to the opinion, I will endeavor, as briefly as possible, to state the issues and the decision of the court in the language of the court.

The first cause of action (Tr., pp. 2–21) alleges that the plaintiffs and Ernest B. Tull are children of *F. M. Tull*, one of the defendants; that in 1888, then being minors, Dora May being ten years old, William B. fourteen, and Ernest five, *P. D. Tull*, a brother of F. M., was appointed guardian; that on March 1, 1889, F. M. Tull delivered to P. D. Tull as said guardian his promissory note for $14,000, due five years after date, interest at 10 per cent., and secured by mortgage upon the property described in the complaint. The mortgage was recorded. On 7th September, 1889, the guardian

released and satisfied the mortgage. The release was without any order of court authorizing it, without knowledge of the probate court, without payment of the debt secured, which is still undischarged; that said release and satisfaction was made in pursuance of a conspiracy between the defendants F. M. Tull, P. D. Tull, and The German Savings and Loan Society, entered into some time in 1888, with the fraudulent intent, among others, to cheat and defraud the plaintiffs and their brother; that July 18, 1888, plaintiffs and defendant Ernest Tull were the owners in fee-simple of the property described in the mortgage, and that P. D. Tull and F. M. Tull then and there conspired together for the purpose of cheating plaintiffs and their brother Ernest out of the said real estate, procuring the appointment of said P. D. Tull as guardian, and by filing petition in the probate court of Spokane county, falsely alleging it would be beneficial to plaintiffs and their brother to sell their interest in the real estate. The probate court ordered the property sold for cash, and the guardian did sell the same to F. M. Tull and reported the same to the court, which approved the sale November 27, 1888, and the guardian executed the deed therefor, recorded December 1, 1888.

The bill alleges that said sale was not made for cash or for any consideration passing at that time or at the time said deed was executed; that all the proceedings were brought about by F. M. Tull and P. D. Tull to secure to F. M. Tull the whole estate and undivided title and interest in the real estate and for the purpose of cheating and defrauding plaintiffs and Ernest B. Tull; that the purchase price, $14,000, was grossly inadequate, and that at the date of the transaction the interest of plaintiffs and their brother was worth $35,000 and upwards. Twenty days afterwards F. M. Tull mortgaged this real estate to the German Savings and Loan Society to secure his note of $40,000; that this mortgage had been negotiated and its terms and conditions agreed and de-

termined upon by the parties previous to the said guardian's proceedings; that previous to the petition for the sale by the guardian the German Savings and Loan Society knew the condition of the property and all about the title to the same; that the guardianship proceedings were arranged, conceived, and all details settled and agreed upon by F. M. Tull and P. D. Tull and the German Savings and Loan Society, by their several attorneys, and that these attorneys drew up and presented them in the probate court; that the German Savings and Loan Society all the time knew that plaintiffs' and their brother's property was worth $35,000 and upwards, and that the decree authorizing the sale was a subterfuge arranged by F. M. Tull for his own benefit; that when guardian's sale was reported to have been made for cash, said society knew the report was false, and that the sale was not for cash nor anything of value; that the report was false and for the fraudulent purpose of allowing F. M. Tull to mortgage said real estate to the savings and loan society for $40,000; that on March 7, 1889, the guardian reported to the probate court that he had invested proceeds of the sale in notes of F. M. Tull, secured by mortgage (this is note and mortgage first herein mentioned); that this report was fraud upon court and plaintiffs, because it was not stated this was second mortgage to the first mortgage of the loan society. On November 5, 1889, the German Savings and Loan Society released the $40,000 mortgage. On October 26, 1889, F. M. Tull gave to the savings and loan society a mortgage on same property to secure note for $50,000. On May 13, 1892, this last mortgage was released. On May 6, 1892, F. M. Tull mortgaged the same property to the German Savings and Loan Society to secure note for $100,000. This mortgage was foreclosed, and by virtue of a deed executed in pursuance of these foreclosure proceedings the German Savings and Loan Society claimed to be the owner of this real estate. The guardian made no reports or entered any account after December 10, 1889. In his petition for guardianship P. D. Tull alleged that this

property, describing it, was mortgaged for $20,000, which was false, and the German Savings and Loan Society knew it; that the property was fraudulently sold to the society; that after the order of sale no further report was made by the guardian; that at the time of the sale by the guardian to F. M. Tull no appraisers were appointed to appraise the same; no guardian *ad litem* was appointed; there was no bidder but F. M. Tull, and the German Society knew all these facts; that the guardian's bond is invalid, the sureties are insolvent, and P. D. Tull is unable to respond in damages for said notes and interest; that the bond required of a guardian when selling ward's real estate filed by P. D. Tull was canceled and discharged immediately after sale, and the sureties are insolvent. Dora May Tull was married to Dormitzer February 20, 1894. Ernest Tull is a minor, residing with his father, F. M. Tull. Plaintiffs had no knowledge or information of the fraud until just before commencement of suit.

The second cause of action is substantially the same, except that it relates to a note of $34,000, secured by mortgage upon the same property above described and other property, which note included the $14,000 above mentioned and $20,000, which was secured upon all the property described in the complaint (Tr., p. 308).

The prayers for relief (stated Tr., p. 309) are: That the release of the $14,000 mortgage be set aside and declared a fraud upon plaintiffs; that they have personal judgment for $14,000 and interest; that the mortgaged premises be sold and the proceeds applied in payment of the amount found due plaintiffs; that the defendants and all persons claiming under them subsequent to the mortgage be barred and foreclosed from all right, title, &c., in said mortgaged premises, &c.; that the German Savings Company mortgage be declared subsequent to plaintiffs' mortgage; that they have execution for any deficiency after sale; that they may be-

come purchasers *and for general relief.* (See Tr., p. 309 and pp. 339–341.)

The answer of the German Savings and Loan Society puts in issue all the material allegations of the complaint, including the claim of ownership in fee of the undivided one-half of the real estate, and fraud and conspiracy of the defendants, the Tulls and the corporation, and any knowledge or information of such fraud, &c.

The defendant then goes on and states what it claims to be the conditions of the loans to F. M. Tull; that it made several loans—first, $40,000, afterwards paid from insurance money; then $50,000 and $25,000, taken up by a loan of $100,000 made about May 5, 1902. Then a further loan of $20,000, May, 1893. These loans were secured by the mortgages, as stated in the complaint. The defendant goes on to state that they required Tull to disclose the truth as to his title and to furnish a correct abstract, and that, these things having been satisfactorily done, they made the loans and took the security, and that they had no knowledge or means of knowledge as to the title other than the public records, and that they learned from them, and relied upon this, that the mortgages had been released and discharged (Tr., p. 310).

The defendant then at great length (Tr., p. 311) sets out certain circumstances connected with the divorce of F. M. Tull from his wife, the mother of these minors, the complainants, and Ernest B. From there it is supposed the Federal question arises, brought to the attention of this court. It is alleged that F. M. Tull and Lucy A. were married in March, 1870, and continuously until May 20, 1887, were residents, householders, and inhabitants of the State of Kansas. On February 25, 1887, F. M. Tull filed his complaint for divorce in Kingman county, Kansas, for a divorce on the ground of adultery committed by Lucy A. The defendant recites the statutes of Kansas (Tr., p. 311) as to service of summons, and upon a person, "being a resident

of the State, departing therefrom to avoid the service of a summons," and providing for service by publication and personal service by the sheriff of the county in which service is to be made, proved by the affidavit of the person making the service. The answer alleges that personal service was had upon Lucy A. in the State of California, and that on May 20, 1887, the Kansas court decreed the divorce. The answer also alleges that while F. M. Tull was a resident of Kansas he accumulated property to the value of $35,000, and owned and possessed the same May 20, 1887. It recites certain statutes of the State of Kansas (Tr., p. 112) under the title of "Divorce and alimony," which were in evidence (Tr., pp. 44, 200), from which it appears that if a decree for divorce shall arise by reason of the fault or aggression of the wife she shall be barred of all right of dower in the lands of which her husband shall be seized at the time of the filing of the petition for divorce, or which he may thereafter acquire, whether there be issue or not, and the court shall order restoration to her of the whole of her lands, tenements, or hereditaments not previously disposed of, and also such share in her husband's real or personal property or both as to such court may appear just and reasonable. Other provisions of the Kansas laws were cited, as to the interest of a wife in her husband's property after his death (Tr., pp. 46, 312). The answer then alleges that the said Lucy A., her heirs, administrators, or legal representatives, had no other right or interest to the property of F. M. Tull than that given by these s atutes, which interest, if at all, in the realty, became vested only in the event of F. M.'s death; that on the dissolution of the marriage and her death the interest of the said Lucy A., her heirs, administrators, assigns, or representatives, in the property of F. M. Tull, ceased to exist under the laws of Kansas, and that F. M. Tull became and remained the owner of the said property, free from any interest, absolute or contingent, present or remote, of his former wife, her heirs, &c. The answer alleges the conversion into

money, after the divorce, by F. M. Tull of his property, real and personal, the purchase of the property with the money brought by him and acquired by him in Kansas, and obtaining deeds June 17, 1887, and August 19, 1887, and the remarriage of F. M. Tull and Lucy A. Tull August 13, 1887, and her death July 18, 1888. It is alleged that Lucy A. never had any interest in the property described in the complaint; that the guardian's sales of the undivided one-half of the portion of said property for $14,000 and the portion for $20,000 were made by mutual mistake of the said F. M. and P. D. Tull, and under the mistaken belief that Lucy A. was in her lifetime the owner of the undivided one-half interest as the community property of F. M. and Lucy A. as husband and wife; that no interest passed to the said plaintiffs or the said Ernest B. by reason of the death of the said Lucy A., and that the sole consideration for the notes for $14,000 and $34,000 was the supposed interest of the said plaintiffs and Ernest B.; that the money loaned by the corporation to F. M. Tull was loaned with the understanding that the same was to be used in making permanent improvements and removing sundry liens; that F. M. Tull, before foreclosure, was and is now insolvent, and that the property is scant security for the mortgage debt. The answer further alleges that on December 10, 1894, F. M. Tull began an action in Spokane county superior court against P. D. Tull, as guardian of Dora May Dormitzer, Ernest B. and William L. Tull, and upon the same allegations herein pleaded the court made a restraining order enjoining the said P. D. Tull from selling, disposing, &c., or contracting concerning the promissory note above mentioned, for $34,000, which restraining order still remains unvacated and said action still pending.

The cross-complaint and answer of the guardian *ad litem* for Ernest B. is identical with the plaintiffs' complaint except as to the relief. The plaintiffs pray for the foreclosure of the two mortgages. The guardian *ad litem* prays (Tr., p.

314) that all proceedings had in the matter of the estate of William L. Tull as against this defendant be declared void; that this defendant, Ernest B., be declared to be the legal owner of an undivided one-third of one-half of the real estate mentioned in the cross-complaint, and that the deeds and mortgages held by the German Savings and Loan Society, as against this defendant, be canceled, and that said defendant deliver to Ernest B. a deed to an undivided one-third of one-half of said real estate; and in case this cannot be done, this defendant prays for foreclosure of the mortgages. The German Savings and Loan Society made the same answer as to plaintiffs' complaint. To these answers and defenses plaintiffs and the guardian *ad litem* file replications (Tr., pp. 60 to 64 and pp. 314 to 318).

The reply admitted nearly all the material allegations of the first affirmative defense, including the allegations that F. M. Tull and Lucy A. Tull were intermarried on March 3, 1870, and resided in Kansas up to and prior to May 20, 1887, and that F. M. purchased the property in question, and that he, prior to the foreclosure of the mortgages, became and continues insolvent.

By way of second reply to said first affirmative defense, it was alleged that the abstracts of title relied upon by the loan society were imperfect and defective, failing to show that the guardian gave the requisite security as guardian, and that said guardian never gave the bond required by the laws of Washington; that P. D. Tull filed in the probate court a paper purporting to be his bond as guardian for $9,600; that the sureties were F. M. Tull, defendant herein, and one McCamant; that the latter has not been a resident of the State of Washington for more than six years; that he is insolvent and has no property of any kind in said State, and that F. M. Tull, since July 23, 1888, has been and is now insolvent; that said bond did not in many respects meet the requirements of the laws of Washington; that said abstracts of title do not show that the guardian, after each

of the sales of real estate to F. M. Tull, complied with the laws of the State, and that neither the proceeds of said sales, nor the notes, nor the obligation, nor other security taken to secure the purchase-money at such sales were produced before the probate court, nor was there any report thereof made by said guardian; that the court confirmed said sales without compliance with the laws relating to guardianship property.

By way of reply to the second affirmative defense of the loan society, it is pleaded that the divorce was procured by fraud practiced upon Lucy A. Tull; that no process was served upon her in said action; that about May 1, 1887, F. M. and Lucy A. Tull left the State of Kansas and never thereafter resided in said State; that when she was boarding the train some one handed Lucy A. certain papers, and that F. M. Tull, before his wife could examine the same, took said papers from her, saying that he knew what they were; that Lucy A. never knew until two months after that that said papers were the complaint in said action for divorce; that she thereupon commenced an action against the husband in Washington Territory to recover from him an undivided one-half interest in the property in question, alleging that the same was the community property of herself and F. M. Tull, and asking that she be declared to be the owner of one-half thereof, and that said decree of divorce had been obtained by fraud; that soon after said action was commenced the parties thereto came to a settlement upon the following terms: 1st, that they should remarry; 2d, F. M. Tull should acknowledge the claims made by the wife to the property in question, to wit, that the property was community property; 3d, that the divorce in Kansas should be declared null and void; that the action was dismissed, the parties were remarried, and the property thereafter enjoyed by said parties as community property.

For a further reply to the answer of the defendant, it was pleaded that on October 18, 1894, P. D. Tull, as guardian,

was ordered by the superior court of Spokane county to show cause why he did not report his acts and doings as guardian. Said order was made at the instance of plaintiff, Dora May Dormitzer, and her husband. That said F. M. and P. D. Tull thereupon offered to settle and compromise their obligations for a small percentage of the amount due said plaintiffs and their brother, which offer was rejected, and thereupon the said Tulls, by duress and threats, sought to compel plaintiffs and their brother to accept said settlement, informing them that if they did not accept such offer he would see to it that they should get nothing out of the estate left by their mother; that on December 10, 1894, F. M. Tull commenced an action in the superior court to declare the property in question to be his separate property, and that the guardianship proceedings were a mistake; that the claims made by said Tull in said action are false and fraudulent and were concocted by him to compel the plaintiffs and their brother to accept said offer of compromise; that up to the time of the death of Lucy A. the husband had admitted the property in question to belong one-half to her, and after her death had admitted that said one-half belonged to plaintiffs and their brother, and that the loan society knew of such facts. It is alleged, as a further reply, that the defense stated in the answer of the loan society did not accrue within two years before the filing of said answer, and the replication further denies all the material allegations in the answer of the loan society.

On September 14, 1898, by leave of the court, plaintiffs and the guardian *ad litem* filed further replies, the first of which denies all the allegations of the first affirmative answer of the loan society, except the allegation in regard to the giving of different mortgages mentioned therein to the loan society and the foreclosure of the mortgages for $100,000 and for $20,000, and that the loan society became the purchaser and is now in possession thereof. And for reply to the second affirmative answer set forth by the loan

society, they admit the marriage of Lucy A. and F. M. Tull March 3, 1870, but allege that they remained husband and wife until the death of Lucy A. Tull, and deny having any knowledge sufficient to form a belief as to any and all of the allegations in second paragraph of said amended answer and down to and including the thirty-second paragraph thereof, and therefore deny the same. And for further reply to said second amended answer, admit that Tull converted his property in Kansas into money and removed with it to Washington in January, 1887; admit conveyance by Glover on June 17, 1887, of part of the property described in the complaint and on August 19, 1887, of the balance of it; that the contract for the purchase of said last-mentioned portion was made on December 28, 1886, and deny each and every other allegation in paragraph 3 of said answer; deny sufficient knowledge to form a belief as to whether or not a divorce was granted between Lucy A. and F. M. Tull on May 20, 1887, or at any other time, or at all, but, on the contrary, allege that said Lucy A. and F. M. Tull were and remained husband and wife from the time of their marriage until the death of said Lucy A.; deny each and every allegation in paragraphs 5 and 6 of said second affirmative answer and defense; deny knowledge sufficient to form a belief as to matters alleged in paragraphs 7 and 8; admit the commencement of the action by Tull on December 10, 1894, but deny knowledge as to whether the allegations are true.

For further reply, it is alleged that this suit of F. M. Tull *vs.* Dora May Dormitzer *et al.* has, by order of the court, been dismissed.

FINDINGS OF FACT.

The supreme court of Washington, sitting as a court of chancery, made elaborate findings of fact in this case (Tr., p. 318). Many of these facts are admitted in the pleadings and need not be repeated here. After reciting the marriage, it is found that at that time the husband had about $100 in property, the wife none, and that afterwards the wife accumulated $1,300 in Missouri, when the parties removed to Kansas, and remained there until December, 1886, or January, 1887. In the fall of 1886 F. M. Tull settled his affairs in Kansas aud had about $25,000. This property was accumulated by him in business. In December, 1886, he contracted to purchase the property in controversy, which was deeded to him in June and August, 1887. In May or June, 1887, he commenced to build business houses on the property, part of which he afterwards occupied, and afterwards was making other improvements, when his wife died intestate, July 18, 1888, leaving minor children, the complainants and Ernest B. Tull, who are the defendants in error here. The money from the Kansas property and the wife's money from the Missouri property and the earnings of the husband in Washington were applied to purchasing this property and carrying on the Washington business. The court found that this property, the property in controversy, was the community property of F. M. Tull and wife at the time of her death (Tr., pp. 349, 360). The court also found that when Lucy A. died the plaintiffs in error refused to go on with the loan until the interest of the children was transferred to the father; that F. M. Tull and the German Savings and Loan Society dealt with this property as a whole on the basis that the children had one-half interest therein; that F. M. Tull and Lucy A. Tull had agreed as to the status of the property before her death, and this status was recognized by the society (Tr., p. 360).

The court found at great length the facts connected with the divorce proceedings in the State of Kansas (Tr., pp. 343–349) and, examining into the jurisdictional facts, found that there was no service upon the defendant, as required by the laws of Kansas, and concluded (Tr., p. 349) that the Kansas court had no jurisdiction to enter the decree of divorce pleaded, and that such decree is fraudulent and void and no bar to the property rights of the wife. In this connection, the court also found, as facts subsequent to the divorce, that in July, 1887, the wife came with her children to Spokane Falls and immediately commenced a suit there praying that the decree of divorce be set aside as fraudulent and she decreed to be the owner of one-half of the property, being the property in controversy here. She set out at great length the improper and adulterous connection of F. M. Tull with a servant girl in Kansas and at other places where he had gone after he had, as found by the supreme court of Washington, abandoned his residence in Kansas. Two days after the service of summons in this suit the husband and wife signed a stipulation dismissing the action, and it is found by the court that they agreed to a settlement of their difficulties, and, as stated by F. M. Tull himself, they agreed to remarry, that she withdraw the suit, and that they should have an interest in the property * * * and settle up the business as man and wife, and the property be together; (Tr., pp. 321, 322), and that they then went through the ceremony of remarrying and continued to live together thereafter until her death.

The court found that five days after the death of Mrs. Tull the defendant, P. D. Tull, on his petition, upon which F. M. Tull, the father, endorsed his request, was appointed guardian of the minor children (Tr., p. 322). On September 3, 1888, upon his application, he was directed, as guardian, to sell a portion of the real estate in controversy. He reported that he had sold the same to F. M. Tull for $14,000, that being the highest bid. The first loan of $40,000 by

the loan society was made after these proceedings in the probate court, although it had been applied for on May 8, 1888, before the death of the wife. The guardian reported that he had received this sum of $14,000 in the note of F. M. Tull for $14,000 due five years after date. In 1889 the buildings burned and the $40,000 was paid out of the insurance. The subsequent loans upon this property were made for the amounts and with the securities as stated in the pleadings, one for $100,000 and the other for $20,000, and foreclosed and a sale made under the decree, and the loan society became the purchaser (Tr., p. 326).

The court then at great length sets out the facts connected with the probate proceedings and the acts of the guardian, P. D. Tull, and the father, F. M. Tull, in transferring the property from the minor children to F. M. Tull; and whether those acts were fraudulent; and whether the loan society, plaintiff in error, took these mortgages upon the property in good faith, without knowing or having the means of information by which it might have known the character of the acts of the guardian and F. M. Tull. The court found that the loan society was not a purchaser in good faith; but conceding that it did not have actual knowledge that the probate proceedings were for the purposes shown in this case, it had actual knowledge of circumstances to put it upon inquiry as to F. M. Tull's title to the children's one-half of the property, and by the exercise of reasonable diligence could have obtained knowledge of all circumstances under which the order of sale of the probate court was made and the title transferred (Tr., p. 357).

The court also found that the probate proceedings were for the purpose of vesting the title to the entire property in the father, so that he might mortgage it to the loan society in order to get money to go on with the buildings in course of construction on part of the property, and that in place of the children's interest being sold for cash, they were to get a mortgage *second and subordinate* to that of the loan society,

for a sum the father was to go through the form of bidding, which had been agreed upon in advance by the probate court; that the guardian did just as he was directed to do by the father, with full knowledge of the probate court, and that no *bona fide* sale in the open market to the highest bidder was contemplated.

ASSIGNMENT OF ERRORS.

The supreme court of the State of Washington erred in that full faith and credit should have been given by the courts of the State of Washington to a certain judgment or decree of divorce rendered in and by the district court of Kingman county, State of Kansas, a court of record and general jurisdiction, on the 20th day of May, 1887, upon the complaint of the plaintiff, personal service upon and answer by defendant, in a certain case wherein F. M. Tull was plaintiff and Lucy A. Tull was defendant, which judgment was specially set up and pleaded as a bar to the maintenance of this action, and in fact in the judgment and decree of the supreme court of the State of Washington in this action full faith and credit, as required by section 1, article IV, of the Constitution of the United States and the laws of Congress, was not given to said decree of divorce, which Federal question was necessary to be and was passed upon by the supreme court of the State of Washington in the final determination of said cause, the decision rendered by the supreme court of the State of Washington being against said claim so specially set up and claimed by the petitioner, The German Savings and Loan Society.

2. The supreme court of the State of Washington erred in holding that the defendant, Lucy A. Tull, in said divorce proceeding was not served with process in said cause.

3. In holding that the answer filed by and in behalf of the defendant, Lucy A. Tull, and the defense in said action by her attorney of record, one J. W. Hughes, was fraudulent and unauthorized.

4. The said supreme court erred in holding that at the time of the commencement of said action for divorce and of the rendition of the decree therein the plaintiff, F. M. Tull, was not a resident of the State of Kansas, within the meaning of the laws of said last-named State.

5. The said supreme court erred in holding that said decree of divorce was obtained by the fraud of the plaintiff, F. M. Tull.

6. The said supreme court erred in holding that the decree of divorce rendered by a court of competent jurisdiction in a sister State, upon personal service and answer and defense, interposed by her, through an attorney of record, can be collaterally assailed on the grounds of fraud, in the courts of the State of Washington, by the heirs of the defendant.

7. The said supreme court erred in holding that a complaint filed by the defendant, Lucy A. Tull, in the district court of Washington Territory, in an action begun by her against F. M. Tull in July following the rendition of said decree of divorce, was admissible in evidence in a collateral proceeding by her heirs as part of the *res gestæ* to establish the alleged fraud in the procuring of said decree of divorce.

8. The said supreme court erred in holding in this action that the district court of the State of Kansas, in said divorce proceeding, had no jurisdiction of the parties or subject-matter therein.

9. The said supreme court erred in holding that the plaintiff in the said divorce proceeding could lose and had lost his long-time residence in the State of Kansas without acquiring a residence elsewhere, and that the district court of the State of Kansas, in that proceeding, was therefore without jurisdiction of the parties to such an extent as to be open to attack by the heirs of one of the parties in this action.

10. The said supreme court erred in that the decision rendered lacks the concurrence of a majority of the said court as constituted at the time of the hearing of said cause and its submission to said supreme court for its determination; wherefore the said decision was null and void and in violation of article V of the amendments to the Constitution of the United States, which provides that no person shall be deprived of life, liberty, or property without due process of law.

11. The said supreme court erred in that its said decision and decree is entirely aside and outside of the issues raised by the pleadings and record in this cause, and is therefore null and void, in that it in effect takes the property of the German Savings and Loan Society without due process of law, in violation of article V of the amendments to the Constitution of the United States; all of which errors appear in the record and proceedings in this cause.

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ARGUMENT.

This case is reported in 23 Wash., 132.

The tenth and eleventh assignments of error are the only ones which do not refer to matters involved in the consideration of the divorce proceeding had in Kansas. The tenth is that the supreme court of Washington erred, in that the decision rendered lacks the concurrence of a majority of the said court, as constituted at the time of the hearing of said cause and its submission to said supreme court for its determination. Wherefore the said decision was null and void and in violation of article V of the amendments to the Constitution of the United States, which provides that no person shall be deprived of life, liberty, or property without due process of law.

It is difficult to see what is meant by this objection. There is nothing in the record to support it. The supreme court of Washington, sitting in regular term, with five judges on the bench, entertained the appeal, heard arguments, decided the case, and it is reported in the 23d volume of the State reports.

Dormitzer vs. German Savings & Loan Society, 23 Wash., 132; see p. III, *ib.*

No objection or suggestion of matter of this kind is shown anywhere.

The eleventh assignment is equally frivolous. The supreme court of Washington carefully stated the issues as made by the plaintiffs and defendants, and decided them. There is no possible question of due process of law.

The other nine assignments of error are confined to matters connected with the divorce proceedings had in the Kansas court, and it is claimed, and as the Federal question in this case, that full faith and credit was not given to the judgment and decree in that case. It is true that the su-

preme court of Washington entered into an inquiry into the jurisdiction of the Kansas court, and that the court declared that Lucy A. Tull, the defendant in the divorce proceedings, had not been served with process in that cause; that the pretended defense was fraudulent; that the plaintiff, F. M. Tull, was not a resident of the State at the time of the commencement of the suit; that the divorce was obtained by his fraud; that the Kansas court had no jurisdiction to enter the decree of divorce, and that such decree was null and void.

But in this case there are other questions which were considered and determined, and which are not alluded to in the assignment of errors. They are in the record, however. It is urged upon the part of the defendants in error, who make this motion, that the cause was decided upon grounds which involved no Federal question and which were broad enough to support the judgment, notwithstanding the Federal question of full faith and credit to be given to the judgment of another State.

The State court, as one of the grounds for its judgment, decided that this property in controversy is presumed to have been the community property of F. M. Tull and his wife at the time of her death.

Certain statutes of Kansas relating to property rights are pleaded by the respondent (plaintiff in error). Referring to this matter, the court said (Tr., p. 349): "The only proof offered as to the laws of Kansas is not as to the status of property during the continuance or existence of the community; but as to the effect of a dissolution by death or divorce. In the absence of proof of the laws of another State in relation to the property rights of husband and wife as to property acquired there during marriage, it has been held that they will be presumed to be the same as those of the States where the proceeds of such property have been re-invested (*Marsteen vs. Lash*, 61 Cal., 622; *Shumway vs. Leakay*, 67 Cal., 438; *Mortimer vs. Marder*, 93 Cal., 172). This

court has held that under the statutes of this State lands acquired after marriage by a deed of purchase expressing a money consideration are presumed to be community property, and the presumption can be rebutted only by clear and convincing proof that the consideration was furnished out of the grantee's separate property (*Yesler vs. Hochstetler*, 4 Wash., 349). From the view we take of this case, it is not necessary to further discuss the question of presumptions" (Tr., pp. 349, 350; 23 Wash., 206). And further (Tr., p. 360): "We have already decided that the property in controversy is presumed to have been the community property of F. M. Tull and wife at her death."

The decree of the Kansas court was a decree simply dissolving the bonds of matrimony—nothing else.

Another of these grounds, and what the State court held as decisive of this case, is summed up by the court thus: "Whether the respondent (the plaintiff in error) took its mortgages upon the property in controversy in good faith, without knowing or having the means of information by which it might, by the exercise of common prudence, have known of the acts of the guardian and F. M. Tull in transferring the property from the minor children of F. M. Tull, and whether these acts were fraudulent" (Tr., p. 350; 23 Wash., 207). The court held that the respondent (plaintiff in error) was not a purchaser in good faith, and that it had sufficient knowledge to put it upon inquiry, which would have shown the fraudulent character of the mortgagor's title, and was of opinion the mortgagee (the plaintiff in error) was estopped from disputing the title of the minor children. The court say: "When Lucy A. Tull died respondent refused to go on with the loan until the interest of the children was transferred to the father, F. M. Tull, and the respondent (plaintiff in error) dealt with this property as a whole on the basis that the children had one-half interest therein. F. M. Tull and Lucy A. Tull had agreed as to the

status of the property before her death, and this status was recognized by the respondent" (Tr., p. 360).

The decision of the court was: "This cause is remanded to the court below, with instructions to enter a judgment and decree herein adjudging and decreeing that Dora May Dormitzer, William L. Tull and Ernest B. Tull, the appellants herein, are entitled to an unincumbered, undivided one-half of the real estate described in the pleadings in this action, and that the guardian deeds described in said pleadings and orders of the probate court of Spokane county, directing the sale of said half interest, or in any way affecting the same, and the said guardian deeds conveying the same to F. M. Tull by P. D. Tull, as guardian of said appellants, as set out in the pleadings, be declared null and void; and also decreeing that the plaintiffs in the action below recover their costs" (Tr., p. 361; 23 Wash., 224).

The supreme court of Washington then rested its judgment and decree upon these grounds:

I. That at the time of the death of Lucy A. Tull the property in controversy is presumed to have been the community property of her and F. M. Tull, her husband, and that her right, title, and interest therein descended to her children.

II. That the probate proceedings, including the appointment of the guardian, the sales of the property, and execution of the deeds from the guardian to the father, were fraudulent and void.

III. That the mortgages of the property by the guardian and afterwards by the father to the plaintiff in error were in fraud of the rights of the minors and void, and that the plaintiff in error was not a purchaser in good faith at the sales of said property.

IV. That the plaintiff in error is estopped from denying the title of the minors to the property in controversy.

Of these questions the court in Washington had undoubted jurisdiction. Their decision is broad enough to sustain the judgment and decree, without reference to the Federal question raised by the plaintiff in error.

We submit that the case comes fully within the principles so clearly expressed in *Eustis vs. Boles*, 130 U. S., 361, and so frequently and emphatically affirmed by this court.

N. Y. & N. E. Railroad Co. vs. Woodruff, 153 U. S., 689.
Gillis vs. Stinchfield, 159 U. S., 658.
Mo. Pacific R'y Co. vs. Fitzgerald, 160 U. S., 556.
Harrison vs. Morton, 171 U. S., 38.
Hale vs. Lewis, 181 U. S., 473.
Rutland R. Co. vs. Cent. Vermont Co., 159 U. S., 630.

It is further respectfully submitted that if the Federal question raised by the plaintiff in error is considered, the decision of the Washington court was so clearly right that its judgment and decree should be affirmed.

Thompson vs. Whitman, 18 Wall., 457.
Andrews vs. Andrews, Oct. T., 1902, U. S. Sup. Ct.
Bell vs. Bell, 181 U. S., 175.
Streitwolf vs. Streitwolf, *ib.*, 179.

ROBERT A. HOWARD,
Counsel for Defendants in Error.